SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 988

HOTEL AND RESTAURANT EMPLOYEES UNION LOCAL NO. 556, ERNEST LEGATO, KENNETH EVERHART, JULIUS KARLAKOFSKI, and HAROLD KENSINGER, INTERNATIONAL REPRESENTATIVE and TRUSTEE, as individuals,

Appellants,

vs.

DANIEL EMERY and MILEDA EMERY, d/b/a THE MAIN DINER,

Appellees.

APPEAL FROM THE SUPREME COURT
STATE OF MINNESOTA

STATEMENT AS TO JURISDICTION

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Appellants,

vs.

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Appellees.

APPEAL FROM THE SUPREME COURT STATE OF MINNESOTA

STATEMENT AS TO JURISDICTION

The appellants, pursuant to United States Supreme Court Rules 12(2) and 15, hereby file their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment of the Minnesota Supreme Court in this case, and should exercise such jurisdiction.

There is also presented in this statement an additional claim of denial of a federal right arising under the Fourteenth Amendment which would not, standing alone, present an issue reviewable by this Court on direct appeal. If this latter claim was the only error complained of, the appellants would be limited to a petition for a writ of certiorari pursuant to 28 U.S.C. §1257 (3). The issue is included in this statement under the authority of *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 547, and *Flournoy v. Wiener*, 321 U.S. 253, 263.

OPINION BELOW

The final judgment of the Minnesota Supreme Court from which this appeal is taken is an order of that court entered October 31, 1968, denying rehearing of the case. The order is not reported and was entered without opinion. A copy of the order is appended. The order had the effect of affirming a judgment of the Minnesota Supreme Court entered in this case on September 13, 1968. That judgment was accompanied by an opinion reported at Minn. , 161 N.W. 2d 842 (hereinafter cited to the Northwestern 2d report only). A copy of the opinion is appended.

JURISDICTION

This appeal is made from a final order made and entered by the Minnesota Supreme Court upon a petition for rehearing filed by the appellants on September 23, 1968, to permit reargument of the case in view of the decision of that court dated September 13, 1968.

Rehearing was denied on October 31, 1968. A notice of appeal to this Court was filed in the Minnesota Supreme Court

on December 12, 1968, and was duly served upon the appellees.

The Supreme Court of the United States has jurisdiction to review the order complained of by direct appeal pursuant to the provisions of 28 U.S.C. §1257 (2).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Johnson v. Florida*, 391 U.S. 596; *Cox v. Louisiana*, 379 U.S. 536, 379 U.S. 559; *Griswold v. Connecticut*, 381 U.S. 479; *Re Groban*, 352 U.S. 330; *Near v. Minnesota*, 283 U.S. 697; *Carlson v. California*, 310 U.S. 106; *Stromberg v. California*, 283 U.S. 359; *Southwestern Telegraph and Telephone Co. v. Danaher*, 238 U.S. 482; *Spencer v. Merchant*, 125 U.S. 345.

Two provisions of the Minnesota Labor Relations Act are claimed to be invalid as construed by the Minnesota Supreme Court in its opinion entered on September 13, 1968. The first of these is Minn. Stat. §179.11 (7) which provides:

> It shall be an unfair labor practice.
>
> * * *
>
> (7) For any employee, labor organization or officer, agent, or member thereof, to compel or attempt to compel any person to join or to refrain from joining any labor organization or any strike against his will by any threatened or actual unlawful interference with his person, immediate family or physical property, or to assault or unlawfully threaten any such person while in pursuit of lawful employment.

(1 Minn. Stat. (1967) §179.11 (7), p. 2060; the text will also be found at 13A West's Minnesota Statutes Annotated (hereinafter cited as "M.S.A.") §179.11 (7), p. 81).

The second provision of the Minnesota Labor Relations Act involved in this case is §179.42, which provides:

> It is an unlawful act and an unfair labor practice for any person or organization to combine with another, to cause loss or injury to an employer, to refuse to handle or work on particular goods or equipment or perform services for an employer, or to withhold patronage, or to induce, or to attempt to induce, another to withhold patronage or other business intercourse, for the purpose of inducing or coercing such employer to persuade or otherwise encourage or discourage his employees to join or to refrain from joining any labor organization or for the purpose of coercing such employer's employees to join or refrain from joining any labor union or organization.

(1 Minn. Stat. (1967) §179.42, p. 2067; 13A M.S.A. §179.42, p. 124).

The acts prohibited by these sections of the Act are subject not only to civil remedies, but to criminal penalties as well. Although the Minnesota Labor Relations Act does not specifically provide criminal sanctions, the Act does declare prohibited conduct to be unlawful. See Minn. Stat. (1967) §§179.11 (10) and 179.42. Minn. Stat. §645.241 provides that:

> 645.241 Punishment For Prohibited Acts.
> When the performance of any act is prohibited by a statute, and no penalty for the violation of the same shall be imposed in any statute, the doing of such act shall be a misdemeanor.

(2 Minn. Stat. (1967) §645.241, p. 5394; 42 M.S.A. 1969 Cum. Ann.Supp. §645.241, p. 28)

QUESTIONS PRESENTED

For review upon direct appeal:

> Whether a state statute which, as authoritatively construed, forbids communication to the public by conversation, leaflets, letter and peaceful picketing, of facts and opinion concerning a labor dispute with a self-employed person, and which imposes criminal penalties and permits the recovery of compensatory and punitive damages for engaging in such activity, is contrary to the Fourteenth Amendment.

The appellants also contend that the judgment below contains further error which involves a question not subject to review by this Court on direct appeal, but which nevertheless constitutes a denial of a federal right in violation of the Fourteenth Amendment. We submit that the issue presents a substantial federal question which the Court ought to review, and may properly consider along with the issue presented on appeal, under the rule of *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, and *Flournoy v. Wiener*, 321 U.S. 253. This second issue is:

> Whether the interpretation given to Minn. Stat. §§179.11 (7) and 179.42 was so unnatural and unforeseeable as to deprive appellants of due process in violation of the Fourteenth Amendment.

STATEMENT OF THE CASE

Note: The record before the Minnesota Supreme Court is hereinafter cited as "(R. —)." Appellants were "respondents" below and their brief is cited herein as "respondents' brief, q. —." Appellees were "appellants" below and their brief is cited as "appellants" brief, p. —."

The appellees, Daniel Emery and his wife Mileda Emery owned and operated the Main Diner, a small lunch counter-restaurant. It is not disputed that the diner did not have a high enough dollar volume to be engaged in "commerce" within the meaning of §2(6) of the Labor-Management Relations Act, as amended, 29 U.S.C. §152 (6). There was a collective bargaining agreement between appellees and the appellant Union effective from September 1, 1961, to August 31, 1963, which provided that if all of the work in an establishment is done by one or two proprietors they must become at least "passive members" of the union. Passive members do not attend union meetings or vote, although, they are entitled to the union death benefits. (Defendants' Ex. 1; R. 22, 52). Passive membership enables the union to obtain collective bargaining agreements with small owner-operated establishments, making them nominally "union houses" and assuring that if they do hire additional employees, the collective bargaining agreement will apply (R. 91-93, 113, 164-165).

Mrs. Emery had, prior to marrying Mr. Emery, been employed as a waitress in another restaurant in Saint Paul where she had been a member of the appellant union. Upon leaving the employ of that restaurant, she had taken a withdrawal card from the union which permitted her to remain a member of

the union exempt from all union dues or fees so long as she did not work at the trade. She could resume active membership at any time without having to pay the usual initiation fee by depositing the card, paying one month's dues and a nominal service charge (Defendants' Ex 3; R. 148-151, 189-194, 201).

At one time the Emerys employed a part-time waitress. A time came when she was laid-off and the Emerys undertook to operate the diner entirely by themselves. A dispute arose subsequently between the Emerys and the appellant union because both Mr. and Mrs. Emery refused to join the union either as a passive or an active member. Appellant Legato is a business representative for the appellant union. Upon his learning that the appellees no longer employed a waitress and that both of them were working at the diner, he requested that Mrs. Emery deposit her withdrawal card, or that either of the appellees join the union as an active or passive member in accordance with the requirements of the collective bargaining agreement, which was, at that time, still in effect (R. 75-76, 79). The appellees refused and there followed a hearing by the State Labor Conciliator. Efforts at conciliation were unsuccessful, however, and on or about June 1, 1963, respondent union commenced picketing in front of the diner (R. 24).

The picketing was conducted by means of a single picket carrying a sandwich-board sign. The sign bore the legend:
wich-board sign. The sign bore the legend:

UNFAIR
This Place Does Not Comply
With Union Standards Of
HOTEL & RESTAURANT
UNION 556
AFL-CIO

The picketing was entirely peaceful. There was no physical interference with any of appellants' customers nor was there any

attempt to block the entrance to the diner, or to prevent any deliveries (R. 24-25, 30-31, 64, 70-71, 105-106).

In addition to the picketing, the following activities are central to the issues in the case. By letter of July 31, 1963, respondent Everhart, another business representative of the union, wrote to Mr. Marty White, business representative of Local 329, the union representing the employees of American Linen Company, a company located across the street from the diner. The letter is reprinted in its entirety for the convenience of the Court in the appendix to this statement of jurisdiction.

On October 24, 1963, the respondents Legato and Everhart held a conversation across the street from the diner with Mr. White and several other persons. Approximately twenty or twenty-five persons were also present. Mr. Legato and Mr. Everhart handed out leaflets (see R. 110) publicizing their dispute with the Main Diner. Mr. Everhart spoke with Mr. White, and with the picket (R. 30, 32, 68-69, 94-102, 110, 146-148, 172-173).

Mr. and Mrs. Emery sold the diner on July 1, 1964, for five thousand dollars, five hundred dollars more than Mr. Emery paid for it in 1961.

PROCEEDINGS BELOW

In December of 1963, appellees brought a civil action against the appellants in the state district court for the second judicial district (Ramsey County), alleging, in substance, that appellants, by picketing and other conduct had injured appellees in their business in violation of Minnesota law, and praying for $25,000.00 compensatory and $10,000.00 punitive damages (R. 1-3).

The case was tried before a jury. It is important to note that the case was submitted to the jury on the following special verdict (see R. 251):

SPECIAL VERDICT OF JURY

1. Was the following statute violated:

179.11. It shall be an unfair labor practice: (7) For any employee, labor organization, or officer, agent, or member thereof, to compel or attempt to compel any person to join or to refrain from joining any labor organization or any strike against his will by any threatened or actual unlawful interference with his person, immediate family or physical property, or to assault or unlawfully threaten any such person while in pursuit of lawful employment.

If the statute was violated, were plaintiffs damaged as a result thereof:

(a) Damages resulting from overall picketing. $——.

(b) Damages resulting from the letter of July 31 from Everhart to White ..... $——

(c) Damages resulting from the distribution of the leaflet of May, 1964. ..... $——.

(d) Damages resulting from the activities of certain of the defendants on October 24, 1963. $——.

2. Was the following statute violated:

179.42. It is an unlawful act and an unfair labor practice for any person or organization to combine with another, to cause loss or injury to an employer, to refuse to handle or work on particular goods or equipment or perform services for an employer, or to withhold patronage, or to induce, or to attempt to induce, another to withhold patronage or other business intercourse, for the purpose of inducing or coercing such employer to persuade or otherwise encourage or discourage his employees to join

or to refrain from joining any labor union or organization or for the purpose of coercing such employer's employees to join or refrain from joining any labor union or organization.

If the statute was violated, were plaintiffs damaged as a result thereof:

(a) Damages resulting from overall picketing. $——.

(b) Damages resulting from the letter of July 31st from Everhart to White ..... $——.

(c) Damages resulting from the distribution of the leaflet of May, 1964 ..... $——.

(d) Damages resulting from the activities of certain of the defendants on October 24, 1963. $——.

3. Punitive Damages: ..... $——.

The jury, for its verdict, answered as follows:

1. (a) $3,000.00
1. (b) $ 0
1. (c) $ 0
1. (d) $ 0
2. (a) $ 0
2. (b) $ 250.00
2. (c) $ 0
2. (d) $ 250.00
3. $10,000.00

(R. 251).

The special verdict is particularly important in this case. It establishes that the only basis for recovery submitted to the jury was a violation of Minn. Stat. §§179.11(7) and/or 179.42. It also makes clear that the jury was permitted to assess compensatory and punitive damages for the peaceful communication of facts and ideas. Finally, it shows that the punitive damages levied against the appellants were not as-

signed to specific conduct, but rather were based on the overall conduct of the appellants.[1]

Upon the motion of the appellants for judgment nothwithstanding the verdict or a new trial, the trial court set aside the verdict (See R. 256-261). As to §179.11 (7), the grounds were that there was no evidence of threatened or actual unlawful interference with the person, immediate family or physical property of the appellees, nor any assault or unlawful threat, and as to §179.42, because appellees had no employees and hence could not come within the literal language of that section of the Act.

The Court also granted a new trial in the alternative unless plaintiffs, for the purpose of appeal, consented to a reduction of the total amount of the verdict from $13,500.00 to $8,500.00.

In its memorandum, the trial court pointed out that the Minnesota Supreme Court, in a case decided seven years after the passage of §179.11, had upheld the right of a union to picket an owner operated establishment for the purpose of in-

---

[1] Compare:

"As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained . . . It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case is sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld."

Stromberg v. California, 283 U.S. 359, 368

"Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded."

New York Times Co. v. Sullivan, 376 U.S. 254, 284.

ducing the owner to join a union "even though the picketing might cause a loss of business or prevent deliveries of supplies to his place of business," (R. 258, *Coons v. Journeymen Barbers Union*, 222 Minn. 100, 23 N.W. 2d 345 (1946); and that after the passage of §179.42, the Minnesota Supreme Court had decided *Starr v. Cooks Union*, 244 Minn. 558, 70 N.W.2d 873 (1955), in which the court had reviewed at length the decisions of the United States Supreme Court delineating the constitutional boundaries applicable to the regulation of peaceful picketing, and had concluded that the burden of proving an unlawful objective is on the party who would seek to enjoin or recover damages for such activities.

The Emerys thereafter appealed to the Minnesota Supreme Court.[2]

HOW THE FEDERAL QUESTIONS WERE PRESENTED

Under Minnesota practice, the issues before the Minnesota Supreme Court are framed by the parties in their briefs. See Rules 128.01 (2); 128.02, Minnesota Rules of Civil Appellate Procedure, 277 Minn. 15, 16; 27A M.S.A. 274, 278. The Emerys, in their broad statement of the issues (appellants' brief p. 3), did not refer in specific terms to the implicit First and Fourteenth Amendment issues, but their brief discusses at length the free speech doctrines of this Court and of the Minnesota Supreme Court, although only as applied to picketing (Appellants' brief, pp. 11-20).

[2] Appellants also filed a notice of appeal to the Minnesota Supreme Court after the trial court had denied appellants' motion to require the appellees to make the election to remit by a definite date. The issue thus raised by the appellants in their appeal before the Minnesota Supreme Court is not material to this appeal and is not involved here.

The appellants (respondents below) did frame their statement of the issues below to include a question which referred in specific terms to the protection afforded by the Fourteenth Amendment, stating (Respondents' brief p. 3):

> 3. Were the activities of the defendants protected by the Fourteenth Amendment?

In their brief appellants pointed out that violation of the particular provisions of the Minnesota Labor Relations Act involved in the case carry criminal sanctions, that the activities which the appellees sought to proscribe were entirely peaceful, and included not only picketing, but other forms of peaceful communication, including the handing out of leaflets, communication by letter, and mere conversations. (Respondents; brief pp. 20 et seq.). Appellants also argued in their brief and before the court below that the adoption of the statutory construction urged upon the Minnesota Supreme Court by the appellees would clearly be contrary to the principles set forth by this Court in *Bouie v. Columbia*, 378 U.S.347 (Respondents' brief, p. 18).

Thus, it is clear that the federal question involved in this appeal were before the Minnesota Supreme Court.

In order for this Court to evaluate fully the important jurisdictional questions which are presented by this case, we would at this point, direct the Court's attention to certain features of the decision of Minnesota Supreme Court.

Central to the holding below and to the questions before this Court is the issue of statutory interpretation, because it is uncontroverted that at no time did appellants engage in any of the conduct described by the language which qualifies §179.11 (7) (". . . by any threatened or actual unlawful interference with his person, immediate family or physical property, or to

assault or unlawfully threaten such person while in pursuit of lawful employment"), nor did the appellees have any employees—the apparent prerequisite to a finding of unlawful activity under § 179.42, according to its literal terms.

The court below dealt with the absence of any threatened or actual unlawful interference etc. by giving a bifurcated reading to the single sentence which comprises § 179.11 (7), holding the qualifying language to apply only to the words "any strike against his will" and not to the words "any labor organization."

The court offered this explanation for its holding:

> It is clear of course that the phrase "threatened or actual unlawful interference" refers only to strikes. The legislature was undoubtedly aware that there are various means of coercion and did not intend to allow some coercive methods to the exclusion of other coercive methods to compel one to join or refrain from joining a labor union (161 N.W. 2d at 846).

The holding as to §179.42 was also supported by an *ipse dixit*. The court decided that appellants had violated the statute notwithstanding the absence of employees, because:

> It is hardly conceivable that the Minnesota legislature would enact a law to prohibit or prevent coercion of employees by a union and leave no corresponding protection to prohibit or prevent coercion by a union against an employer or self-employer for an unlawful purpose. There is ample evidence in the record herein to show that these dedefendants unlawfully interfered with the self-employed plaintiff's property rights (161 N.W. 2d at 851).

The court made an analysis of its own decisions and the decisions of this Court with respect to the constitutional limita-

tions on state regulation of picketing. However, its analysis and discussion was predicated solely on doctrines applicable to picketing. The court referred only once in its opinion to the findings of the special verdict (at the conclusion of its statement of the case—see 161 N.W. 2d at 845-846) and did not attempt to discuss any constitutional doctrines that might apply to the specific activities, other than picketing which were found to be unlawful by the jury.

The court's interpretation of *Teamsters Union v. Hanke*, 339 U.S. 470, led it to conclude that states, and particularly state courts, were free to regulate picketing, and by implication all other peaceful activities, upon a finding that the object of such activities contravened the community's best interests as defined by those courts, notwithstanding contrary public policy expressed by the state legislature. The Court stated that:

> Endorsing the rationale of the Washington court was tantamount to giving courts the authority to enjoin undesirable picketing. All that was necessary was to find that the picketing contravened the community's best interests. *Accordingly, the United States Supreme Court has abandoned to the states the task of defining the allowable area of economic conflict* (Emphasis added. 161 N.W. 2d at 850).

Relying upon a case decided by an intermediate appellate court in California, *Riviello v. Journeymen Barbers Union*, 88 Cal. App. 2d 499, 199 P. 2d 400 (Cal. D. Ct. App., 1st D., 1948); which neither party had referred to in their briefs, the court went on to find that appellants had sought to compel the appellees to join the union as passive members and thus were denied certain rights and privileges available to regular members. Therefore, under its view of Minnesota public policy,

"the actions of defendants must be held to constitute an unlawful labor objective. Their objective being unlawful, *picketing* to obtain it is also unlawful." (161 N.W. 2d at 852. Emphasis added.).

One justice dissented on the ground that in his opinion the statutes on their face are inapplicable to the facts of the case. He pointed out that the instructions to the jury were based on §§179.11 (7) and 179.42 and observed:

> I think it highly doubtful, in this context, that the jury based its verdict on considerations of public policy other than the statues. Because Minnesota has rather comprehensive labor relations statutes, I think the court itself should defer to legislative action and not add to the body of labor law by judicial decision (Footnote omitted. 161 N.W. 2d at 854).

Thereafter, on September 23, 1968, appellants filed a petition for rehearing, arguing (1) that §§179.11 (7) and 179.42 as construed by the Minnesota Supreme Court prohibit and punish constitutionally protected activity; and (2) that the unnatural and unforeseeable interpretation which the court gave to these two narrow and precisely worded provisions contravened the due process clause of the Fourteenth Amendment.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I

Whether a state statute which, as authoritatively construed, forbids any communication to the public by conversation, leaflets, letter and peaceful picketing, of facts and opinion concerning a labor dispute with a self-employed person, and which imposes criminal penalties and permits the recovery of compensatory and punitive damages for engaging in such activity, is contrary to the Fourteenth Amendment.

As the Statement of the Case makes clear, the Minnesota Supreme Court has construed two sections of the Minnesota Labor Relations Act, both of which carry criminal sanctions, to prohibit peaceful picketing, the communication of facts and ideas by leaflets and by letter, and mere conversations. The justification relied upon by the court for bringing those activities within the Act, was that their object was to compel self-employed persons to join a union with "passive" membership status—a discrimination which was held to be contrary to Minnesota public policy, notwithstanding that the activities engaged in by appellants are otherwise expressly permitted by statute, that the "public policy" adopted by the court is not to be found in any Minnesota legislation nor even hinted at in any prior Minnesota case, that this policy was extracted from a California intermediate appellate court decision which had not been referred to in the briefs or argument of either party,

and that the record showed that appellees had refused to join the union on either an active or passive basis.[3]

Under the judgment reinstated by the Minnesota Supreme Court, the damages which appellants would be required to pay consist in greatest measure of punitive damages.

Where a state statute is construed by the highest court of that state so as to proscribe the peaceful communication of ideas or information, the statute as thus construed is in conflict with the Fourteenth Amendment and this Court has jurisdiction, pursuant to 28 U.S.C. §1257 (2), to review the decision of the state court on appeal. *Cox v. Louisiana*, 379 U.S. 536, 379 U.S. 559; *Carlson v. California*, 310 U.S. 106; *Stromberg v. California*, 283 U.S. 359; *Near v. Minnesota*, 283 U.S. 697; *Accord*, as to jurisdiction where a state statute as construed is violative of the Fourteenth Amendment, see *e.g.*, *Johnson v. Florida*, 391 U.S. 596. *Griswold v. Connecticut*, 381 U.S. 479; *Re Grobin*, 352 U.S. 330; *Southwestern Telegraph and Tele-*

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[3] The only testimony on the question of whether active or passive membership was available to the appellees or whether they would have accepted active membership was that of Kenneth Everhart, business representative for the union, who testified:

(Mr. Everhart, recross-examined by Mr. Kempe)

Q. Because Mr. and Mrs. Emery refused to become passive members or **active members**, this is the reason they were not issued a union house card isn't this true?

A. No, it's not. Either one could have. The constitution is clear on that, either one.

* * * * *

Q. There is no doubt in your mind Mr. and Mrs. Emery refused to become passive members of the union, **either active or passive members?**

A. That's very clear.

(Emphasis added. R. 187.)

Where a claim of constitutionally protected right is involved, the Court does not permit itself to be completely bound by the state court's view of the record lest federal law "be frustrated by distorted fact finding," **Cox v. Louisiana**, 379 U.S. at 545, n. 8, but makes an independent examination of the whole record. See **New York Times Co. v. Sullivan**, 376 U.S. 254, 285; **Edwards v. South Carolina**, 372 U.S. 229, 235.

phone Co. v. Danaher, 238 U.S. 482, *Spencer v. Merchant*, 125 U.S. 345.

Jurisdiction exists regardless of whether the sanction actually imposed under the statute in a particular case against the exercise of a federally-protected right is criminal or civil, for "the fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *New York Times Co. v. Sullivan*, 376 U.S. 254, 277. "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *Id.*, 376 U.S. at 265. See also, *Barrows v. Jackson*, 346 U.S. 249, 255-256; *Southwestern Telegraph and Telephone Co. v. Danaher*, 238 U.S. 482, 489-491.

The nature of the rights thus limited by the holding of the Minnesota Supreme Court and the sweeping scope and potential effect of the ruling compel the conclusion that the federal question presented is substantial. By direct implication from the nature of the activities for which appellants were held liable under the special verdict which was reinstated and endorsed by the Minnesota Supreme Court, the Minnesota Labor Relations Act would make it unlawful to engage in any activity, no matter how peaceful, so long as a potential object of that activity is to obtain union membership from any person (according to the interpretation below of §179.11 (7) or from a self-employed person (according to the interpretation below of §179.42). Under the form in which the verdict was requested and returned, the entire sum of punitive damages assessed may have been awarded solely because of, for example, appellant Everhart's letter to Mr. White (Plaintiff's Ex. 11. See Appendix), or because of the leaflets which appellants handed out (see R. 110). Yet we respectfully submit that there is nothing in the letter or the leaflets which serves to remove

from these items the traditional protection accorded free speech under the First and Fourteenth Amendments. Thus, the Minnesota Supreme Court has created a powerful weapon for the suppression of practically any effort by labor unions to organize the unorganized, to maintain industry-wide standards, or to gain, by peaceful means, other legitimate objectives. Compare, *American Federation of Musicians v. Carroll*, 391 U.S. 99; *Mineworkers v. Pennington*, 381 U.S. 657.[4]

The intended scope of the Minnesota Supreme Court's ruling is perhaps best indicated by the court's fundamental premise, which was derived from its reading of *Teamsters Union v. Hanke*, 339 U.S. 470:

> Endorsing the rationale of the Washington court was tantamount to giving courts the authority to enjoin undesirable picketing. All that was necessary was to find that the picketing contravened the community's best interests. Accordingly, the United States Supreme Court has abandoned to the states the task of defining the allowable area of economic conflict. (161 N.W. 2d at 850).

It should be noted that the sweep of this premise is not even limited by an acknowledgment of the limitations imposed by the doctrine of federal preemption, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, much less by the restrictions of the United States Constitution or the particular facts involved in the *Hanke* case. The circumstances of *Hanke* are

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[4] Presumably the Minnesota Supreme Court's holding would even prohibit union security clauses which have as their acknowledged object to compel a person to join a labor organization. Appellants raised this possibility in their brief below, contending that because of §14 (b) of the Labor Management Relations Act, as amended, 29 U.S.C. §164 (b), the construction urged by the Emerys would convert Minnesota, by sheer judicial fiat, to a "right to work" state. (Respondents' brief, pp. 13-14). The court did not comment on this suggested consequence of its holding.

wholly inapposite to the activities engaged in by the appellants.

Hanke consisted of two consolidated cases, in which two affiliated unions had sought to compel two used car dealers in Seattle (Hanke and Cline) to abide by an agreement which the union had negotiated with an association of automobile dealers in Seattle. The agreement would have required Hanke and Cline to close their used car lot by six p.m. on weekdays and all day on Saturdays, Sundays, and eight specified holidays. Both of the dealers were open for business at times prohibited by the agreement and neither had signed the agreement. Although the union was seeking to apply the agreement to 115 dealers, only 10 dealers actually had any employees. The picketing caused delivery of needed spare parts to the two dealers to cease, and the pickets physically blocked Cline's driveway, forcing Cline to close it. Customers of the two dealers were harassed by having their license numbers written down by pickets. When asked by patrons why the numbers were being taken down, the pickets replied, "You'll find out." There was no legislation involved in the *Hanke* case.

Permanent injunctions were issued to restrain the picketing of the two businesses, and Hanke was awarded $250.00 in compensatory damages. The Supreme Court of Washington upheld the relief granted on the theory that the unions were attempting to dictate business policy in order to protect the working conditions of only a handful of members. The Supreme Court of the United States held that the state of Washington was permitted by the Fourteenth Amendment to strike this balance between the freedom of small businesses to determine their own business policy, and the interest of the unions in protecting the working conditions of relatively few persons. The

Court was careful to limit its holding to the precise circumstances involved in the case:

> When an injunction of a State court comes before us it comes not as an independent collocation of words. It is defined and confined by the opinion of the State court. The injunctions in these two cases are to be judged here with all the limitations that are infused into their terms by the opinions of the Washington Supreme Court on the basis of which the judgments below come before us. So read, the injunctions are directed solely against picketing for the ends defined by the parties before the Washington court and this Court. To treat the injunctions otherwise—that is, outside the scope of the issues which they represent—is to deal with a case that is not here and was not before the Washington court . . . (339 U.S. at 480).

At no time in the present case did appellants seek to dictate business policy or interfere in any of the appellees' prerogatives to direct their business as owners. Union membership was an obligation imposed upon the appellees by the collective bargaining agreement with the appellant union and by the terms and conditions of Mrs. Emery's withdrawal card from the union. The activities engaged in by appellants were not before this Court in *Hanke* and that case does not justify the belief of the Minnesota Supreme Court that state courts are free to declare sweeping prohibitions upon the peaceful communication of ideas and information in furtherance of a judicial notion of the best labor relations policy for the community. All that this Court has before it, as in *AFL v. Swing*, 312 U.S. 321, is "an instance of 'peaceful persuasion' disentangled from violence and free from 'picketing en masse or otherwise conducted' so as to occasion "imminent and aggravated

danger." 312 U.S. at 325. contrary to the view of the court below,

> The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. . . . Communication by such employees [those not employed by the employer with whom the dispute exists] of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern or the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's Case."

312 U.S. at 326.

This principle conflicts squarely with the assertion of the Minnesota Supreme Court that "the United States Supreme Court has abandoned to the states the task of defining the allowable area of economic conflict." (161 N.W. 2d at 850).

It has long been recognized that where a state court, by construction of statute, or by other judicial act limits the exercise of peaceful persuasion, speech, picketing or other communications, issues are raised "transcending the local interests involved in the particular action." *Near v. Minnesota*, 283 U.S. 697, 707. As the Court observed in *Cox v. Louisiana*, 379 U.S. 536, 552:

> The Louisiana statute, as interpreted by the Louisiana court, is at least as likely to allow conviction for innocent speech as was the charge of the trial judge in *Terminiello*. Therefore, as in *Terminiello* and *Edwards*, the conviction under this statute is unconstitutional in

that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly.

Accord: Food Employees v. Logan Valley Plaza, 391 U.S. 308; *NAACP v. Alabama*, 377 U.S. 288; *New York Times v. Sullivan*, 376 U.S. 254; *Edwards v. South Carolina*, 372 U.S. 229; *Cafeteria Employees Union v. Angelos*, 320 U.S. 293; *Bakery & Pastry Drivers v. Wohl*, 315 U.S. 769; *AFL v. Swing*, 312 U.S. 321; *Carlson v. California*, 310 U.S. 106; *Stromberg v. California*, 283 U.S. 359; *Near v. Minnesota*, 283 U.S. 697.

For these reasons, appellants respectfully submit that the question presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution.

II

Whether the interpretation given to Minn. Stat. §§179.11. (7) and 179.42 was so unnatural and unforeseeable as to deprive appellants of due process in violation of the Fourteenth Amendment.

The Minnesota Supreme Court, in reversing the trial court and holding that Minn. Stat. §179.11 (7) and §179.42 were violated by peaceful picketing, the passing out of leaflets, conversations, and communication by letter of information and opinion concerning a labor dispute with an owner-operator, gave these provisions an unnatural and unforeseeable interpretation, retroactively expanding narrow and precise statutory language. Our contention is that not even an experienced practitioner could have foreseen at the time the material events of this case occurred, that appellants would sustain any liability for their conduct in view of the language of these and

other Minnesota statutes and the holdings of prior Minnesota cases. It is now well established that such retroactive application of an interpretation which could not reasonably have been anticipated in order to punish otherwise innocent conduct "operates precisely like an ex post facto law," denies due process of law, and is therefore contrary to the Fourteenth Amendment. *Bouie v. Columbia*, 378 U.S. 347, 353.

The principle articulated in *Bouie* that a state court may not, consistent with the concept of due process, declare after the fact that conduct is unlawful when those liable for such conduct could not reasonably have anticipated that their acts were within any legal prohibition can be traced at least as far back as *Southwestern Telegraph and Telephone Co. v. Danaher*, 283 U.S. 482. In *Danaher*, the Supreme Court of Arkansas had upheld a statutory penalty of $6,300.00 imposed against the telephone company on the grounds that the company had adopted an unreasonable regulation relating to delinquent payment from telephone users. In reversing the judgment as contrary to the Fourteenth Amendment, the Court stated:

> If it be assumed that the state legislature could have declared such a regulation unreasonable, the fact remains that it did not do so, but left the matter where the company was well justified in regarding the regulation as reasonable and in acting on that belief. And if it be assumed that the company should have known that the supreme court of the state, in the exercise of its judicial power, might hold the regulation unreasonable, even though the prevailing view elsewhere was otherwise, the question remains whether, in the circumstances, penalties aggregating $6,300 could be imposed without departing from the fundamental principles of justice embraced in the recognized conception of due process of law. In our

> opinion the question must be answered in the negative. There was no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct. Some regulation establishing a mode of inducing prompt payment of the monthly rentals was necessary. It is not as if the company had been free to act or not, as it chose. It was engaged in a public service which could not be neglected. The protection of its own revenues and justice to its paying patrons required that something be done. It acted by adopting the regulation and then impartially enforcing it. There was no mode of judicially testing the regulation's reasonableness in advance of acting under it, and, as we have seen, it had the support of repeated adjudications in other jurisdictions. In these circumstances to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law.

Appellants squarely raised this Fourteenth Amendment issue by contending in their brief before the Minnesota Supreme Court that liability for their conduct would have to be based upon such a strained construction of the applicable provisions of the Minnesota Labor Relations Act that such an interpretation would be contrary to the Fourteenth Amendment under *Bouie v. Columbia.* (Respondents' brief, p. 18).[5] The court did not answer the contention directly, apparently be-

[5] It is of interest to note, in this connection, that the Governor of Minnesota, upon the advice of the Attorney General, informed the Emerys that "We have studied in detail and at great length the issues involved in the dispute between you and the Hotel and Restaurant Employees Union, Local 556 . . ." and "there is no apparent violation of the statutes." (R. 15)

cause of the belief that its analysis of the decisions of this Court, particularly the decision in *Teamsters Union v. Hanke*, met all of the constitutional objections raised below by the appellants, notwithstanding the Minnesota Supreme Court's apparent focus on the application of the cases to picketing, to the exclusion of the other conduct for which appellants were held liable. See 161 N.W. 2d at 849-850. Thereafter, the issues which are presently before this Court were again raised as the primary issues in the petition for rehearing. It is the denial of that petition from which this appeal is being taken.

As we have noted, the question of whether the Minnesota Supreme Court has denied appellants a substantial federal right by virtue of the interpretation given to MLRA §§179.11 (7) and 179.42 is not reviewable upon direct appeal, but is properly presented in this statement under the rule of *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 547, and *Flournoy v. Wiener*, 321 U.S. 253, 263.

We shall not belabor the principles reiterated in the *Bouie* case any further. The question, then, is whether the interpretation of these statutes was, in fact, so unnatural and unforeseeable as to amount to a denial of due process and whether review of that question by this court is warranted. For the following reasons, appellants shall show that the interpretation given to Minn. Stat. §179.11 (7) and §179.42 by the Minnesota Supreme Court was not merely erroneous or subject to a fair difference of opinion among lawyers, but was so contrary to (1) the language of the statutes themselves; (2) to the prior Minnesota cases; (3) to the clearly expressed statutory policy of the state; and (4) to the maxims of construction established by both the legislature and previous decisions of the Minnesota Supreme Court, as to constitute beyond a reasonable doubt an unforeseeable and unnatural expansion

of narrow and precise statutes contrary to the due process clause of the Fourteenth Amendment.

(1)

The Language of the Statutes

With respect to §179.11 (7), there is no dispute that appellants did not engage in any threatened or actual unlawful interference with the person, immediate family or physical property of either appellee, nor any assault or unlawful threat. Under the special verdict, liability was predicated upon a violation of either §179.11 (7) or §179.42. Therefore, Minnesota Supreme Court felt constrained, in reversing the j.n.o.v of the trial court, to read the qualification:

> by any threatened or actual unlawful interference with his person, immediate family, or physical property, or to assault or unlawfully threaten any such person while in pursuit of lawful employment;

to apply only to compelling or attempting to compel a person to join or refrain from joining "any strike against his will," and not to compelling or attempting to compel a person to join or refrain from joining "any labor organization." See Minn. Stat. § 179.11 (7). The court concluded, therefore, that the statute is violated by any "labor practice which attempts to compel a person to join or refrain from joining a labor organization against his will," including each of the activities for which appellants were found liable by the special verdict (161 N.W. 2d at 846).

That court supported its interpretation with the bare assertion that:

> It is clear of course that the phrase "threatened or actual unlawful interference" refers only to strikes. The legislature was undoubtedly aware that there are various means of coercion and did not intend to allow some coercive methods to the exclusion of other coercive methods to compel one to join or refrain from joining a labor union (161 N.W. 2d at 846).

Section 179.42 provides:

> It is an unlawful act and an unfair labor practice for any person or organization to combine with another, to cause loss or injury to an employer, to refuse to handle or work on particular goods or equipment or perform services for an employer, or to withhold patronage, or to induce, or to attempt to induce, another to withhold patronage or other business intercourse, for the purpose of inducing or coercing such employer *to persuade or otherwise encourage or discourage his employees* to join or to refrain from joining any labor organization or for the purpose of coercing such employer's employees to join or refrain from joining any labor union or organization. (Emphasis added.)

With respect to § 179.42, which prohibits conspiracies to engage in certain conduct for the purpose "of inducing or coercing such employer to persuade or otherwise encourage or discourage his employees to join or refrain from joining any labor organization or for the purpose of coercing such employer's employees to join or refrain from joining any labor union or organization," the court held the activities of the appellants were within the prohibitions of this provision even though there are no employees involved in this case. It did so on the grounds that

> It is hardly conceivable that the Minnesota legislature would enact a law to prohibit or prevent coercion of employees by a union and leave no corresponding protection to prohibit or prevent coercion by a union against an employer or self-employer for an unlawful purpose. There is ample evidence in the record herein to show that these defendants unlawfully interfered with the self-employed plaintiffs' property rights. (161 N.W. 2d at 851).

We suggest that it is self-evident that the construction of the statutes adopted below was achieved by utterly destroying the natural syntax of §179.11 (7) and by simply ignoring the literal language of §179.42.

(2)

Prior Minnesota Decisions

In *Coons v. Journeymen Barbers Union*, 222 Minn. 100, 23 N.W. 2d 345, decided in 1946, the Minnesota Supreme Court declared that ". . . peaceful picketing of a place of business for the purpose of inducing the owners to join a labor union is a lawful exercise of the right of freedom of speech secured by the Fourteenth Amendment, even though the owners themselves without any employees do all the work incident to operating the business." 222 Minn. at 103, 23 N.W. 2d at 347. The plaintiff in the *Coons* case was the operator of a one-man barber shop who had sought an injunction to restrain a labor union and certain of its officers from picketing his barber shop. The Minnesota Supreme Court refused to apply *Coons* to the instant case on the ground that subsequent decisions of the United States Supreme Court "have qualified the prior holdings of that court with respect to the exercise of the right

of peaceful *picketing* as a phase of freedom of speech under the Fourteenth Amendment,"[6] (emphasis added) 161 N.W. 2d at 847, and upon the authority of *Riviello v. Journeyman Barbers*, 88 Cal. App. 2d 499, 199 P. 2d 400, decided in 1948, in (emphasis added) 161 N.W. 2d at 847, and upon the authority which the California district court of appeals for the first district held, in the absence of any applicable statutes whatever, that it was contrary to the public policy of California for a union to engage in peaceful picketing to compel an owner-operator to join when the only basis upon which membership was available was nonactive membership. See 161 N.W. 2d 851 et seq.

Significantly, neither party to this case had cited or discussed the *Riviello* case in the briefs to the Minnesota Supreme Court. Unlike the present case, *Riviello* was decided in the absence of any pertinent California statutes or prior case law. It is interesting to note that the Supreme Court of California, subsequent to the time that *Riviello* was decided, condemned the practice of ignoring "the traditional doctrine of separation of powers to write a state law of labor-relations based on the Taft-Hartley Act," and has declared itself "bound to respect the traditional principle of separation of powers that gives to the Legislature the responsibility of making any major changes in social and economic policy." See *Messner v. Journeymen Barbers*, 53 Cal. 2d 873, 351 P. 2d 347, 351-353, and see respondents' supplementary brief in support of petition for rehearing at pp. 2 et seq.

In several other cases. the Minnesota Supreme Court had strongly affirmed the constitutional limitations on state regulation of peaceful labor activities. In *Starr v. Cooks Un-*

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[6] Citing **Gibboney v. Empire Storage & Ice Co.**, 336 U.S. 490; **Hughes v. Superior Court**, 339 U.S. 460; **Teamsters Union v. Hanke**, supra.; **Building Service Employees v. Gazzam**, 339 U.S. 532; and **Local 10, United Ass'n of Journeymen Plumbers, etc. v. Graham**, 345 U.S. 192.

ion, 244 Minn. 558, 565, 70 N.W. 2d 873, 878, a case involving the picketing of an establishment before any employees had been hired, the court observed that according to its reading of the decisions of the United States Supreme Court, "states cannot consistently with the constitution abridge the constitutional freedoms in order to obviate slight inconveniences or annoyances to the public, or abridge them to enjoin conduct which falls short of presenting a clear danger of violating a valid statute declaratory of the state's public policy." In that case, the court went on to say:

> Although the public policy of a state may be found in its constitution, statutes, and court decisions, its establishment is primarily for the lawmakers. (244 Minn. at 565, 70 N.W. 2d at 878)

Similarly, in *Glover v. Minneapolis Building Trades Council*, 215 Minn. 553, 10 N.W. 2d 481, the court held that picketing by employees, singly or in combination as unions, to induce a contractor to cease doing certain work himself and let the work to others belonging to a union, was protected by the Fourteenth Amendment. Thus, it may be seen that appellants had every reason to believe, under existing Minnesota case law, that the activities engaged in to publicize their dispute with the Emerys would be consistent with the statutes and the public policy of the State of Minnesota, as well as protected under the Minnesota Supreme Court's own view of the scope of protection under the Fourteenth Amendment.

(3)

Minnesota Public Policy as Expressed in Other Statutes

There are several other Minnesota statutes which serve to declare the public policy of the state, and to which one would necessarily look in determining whether the activities engaged in by the appellants were lawful. The first of these is Minn. Stat. §185.03, which reads as follows:

> "No restraining order or injunction shall prohibit any persons or persons, whether singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor; or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any such person to abstain from working; *or from ceasing to patronize any party to such dispute; or from recommending, advising, or persuading others by peaceful and lawful means, so to do;* or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner and for lawful purpose, or from doing any act or thing which might lawfully be done in the absence of such dispute by a single individual; *nor shall any of the acts specified in this section be considered or held to be illegal or unlawful in any court of the state.*" (Emphasis supplied.)

This statute, which provides absolute immunity from any court action for engaging in peaceful efforts to persuade persons not to patronize a party to a labor dispute, was the subject of an amicus brief by the Minnesota AFL-CIO Federation of Labor in support of appellants' petition for rehearing. Viewed from the standpoint of whether the interpretation below of §§179.11 (7) and 179.42 was reasonably foreseeable, we submit that the court's decision conflicts squarely with the public policy embodied in §185.03.

A second statute which, we respectfully submit, also provides a better source of Minnesota public policy than does the decision in the *Riviello* case, is Minn. Stat. §185.10, which pertains to injunctions, and which provides:

> 185.10 Restraining orders, when not issued.
>
> No court of the state shall have jurisdiction to issue any restraining order, or temporary or permanent injunction, in any case involving or growing out of any labor dispute, to prohibit any person or persons participating or interested in such dispute, as these terms are defined in this chapter, from doing, whether singly or in concert, any of the following acts:
>
> * * * *
>
> (5) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (6) Assembling peaceably to act, or to organize to act, in promotion of their interests in a labor dispute.
>
> * * * *

(4)
The Legislative and Judicial Maxims of Construction

A further substantial factor in assessing whether the interpretation given t[illegible] Stat. §179.11 (7) and §179.42 could fairly have bee[illegible]pated is the set of maxims which the Minnesota legislature has declared to be controlling in interpreting statutes, as well as the dictates of the Minnesota Supreme Court regarding statutory construction. Minn. Stat. §645.16 provides in pertinent part:

> 645.16 Legislative intent controls.
>
> The object of all interpretations and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.
>
> When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.
>
> * * *

Minn. Stat. §645.17 (2) and (3) provide:

> 645.17 Presumptions in ascertaining legislative intent.
>
> In ascertaining the intention of the legislature the courts may be guided by the following presumptions.
>
> * * * * *
>
> (2) The legislature intends the entire statute to be effective and certain;
>
> (3) The legislature does not intend to violate the constitution of the United States or of this state;
>
> * * * * *

Some examples will suffice to establish the guidelines which the Minnesota Supreme Court has ostensibly established to guide itself and to reinforce the legislative maxims:

According to the rules of legal hermeneutics, one true sense being given to the words, and that being apparent and obvious, we cannot properly seek for another. *McClusky v. Cromwell,* 11 N.Y. 603. This rule is especially applicable where the sense sought is only to be drawn from the language used by a forced and unnatural construction.

Huff v. Winona & St. Peter R.R. Co., 11 Minn. 180, — (Gil. 114, 123).

Since statutory interpretation lies wholly within the domain of ambiguity (State ex rel. Morrison County Agr. Ass'n. v. Inverson, 120 Minn. 247, 139 N.W. 498), then, clearly, plain and unambiguous language leaves no room for construction. In such circumstances, "the statute is its own best expositor." 6 Dunnell Dig. & Supp. §8938, and cases under notes 2 and 3. In other words, "artificial reasoning [should not be] used to create a synthetic ambiguity," nor should we ignore "the fact that the purpose of construction is to remove ambiguity and not to make it." *Naeseth v. Village of Hibbing,* 185 Minn. 526, 529, 242 N.W. 6, 7. And we recently reaffirmed and applied that thought in *State ex rel. City of St. Paul v. Spaeth,* 223 Minn. 18, 222, 26 N.W. (2d) 115, 117, where we said: "The language of the statute is plain and permits of no perversion by the process of construction."

City of Minneapolis v. Village of Brooklyn Center, 223 Minn. 498, 501, 27 N.W. 2d 563, 565.

Eklund v. Evans, 211 Minn. 164, 169, 300 N.W. 617, 620.

Public policy where the legislature has spoken is what it has declared that policy to be.

Park Construction Co. v. Independent School Dist., 209 Minn. 182, 186, 296 N.W. 475, 477.

We do not have the right to grant judgment in defiance of the statute.

The foregoing reasons show that the Minnesota Supreme Court, presumably relying on the decisions of this Court has, in this case, functioned as a source of law paramount to the state legislature, contrary to any possible expectation which appellants could have had when the conduct occurred. Appellants were lulled "into a false sense of security," see *Bouie v. Columbia*, 378 U.S. at 352, not just by the narrow and precise language of the statutes here involved, but by the entire congeries of factors we have just elaborated, none of which served to portend the novel construction or indifference to precedent and legislative expression which characterize the judgment below.

We stress that we do not ask this court to declare a labor relations policy for Minnesota. Nor do we seek to deny a state Court the opportunity to resolve ambiguities in the legislative expression of state public policy or to fill in the interstices of that policy by an orderly process of *stare decisis*. But here the court below has far exceeded the point where the judicial decree nullifies that forewarning of the boundary of transgression to which those seeking to obey the law are entitled under the Fourteenth Amendment. We contend that the holding below could hardly have been anticipated by the most experienced practitioner, and if it is true as Holmes observed that law is ". . . prophecies of what the court will do in fact, and nothing more . . .,"[7] then appellants have been denied

[7] Holmes, "The Path Of The Law," in **Collected Legal Papers**, p. 173, Harcourt Brace & Co., New York (1920).

a right which is fundamental to the existence of our legal order. The due process clause of the Fourteenth Amendment can have little meaning if a state court is free to ignore the express mandate of the legislature in order arbitrarily to regulate peaceful conduct in labor disputes without any regard for the reasonable expectations of the disputants at the time the conduct occurs.

CONCLUSION

Appellants respectfully suggest that the Court has jurisdiction to review by direct appeal the issue of whether the statutes involved as construed prohibit the peaceful communication of information contrary to the right of free speech embodied in the Fourteenth Amendment and that the question presented is substantial, warranting plenary consideration with briefs on the merits and oral argument. It is further contended that the issue of whether the court below violated the Fourteenth Amendment by its unnatural and unforeseeable interpretation of the Minnesota Labor Relations Act is an important question having far-reaching implications for the proper and orderly administration of the legal system and therefore the Court should exercise its power of review with briefs on the merits and oral argument.

Respectfully submitted,

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APPENDIX

State of Minnesota

Office of Clerk
Supreme Court

City of St. Paul Minn.

ST. PAUL, MINN.

October 31, 1968

DANIEL EMERY and MILEDA EMERY, d.b.a.
THE MAIN DINER,

Appellants,

vs.

HOTEL and RESTAURANT EMPLOYEES
UNION LOCAL NO. 556, et al.,

Respondents.

Sir:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,
MAE SHERMAN,
Clerk Supreme Court.
ROBINS, DAVIS
& LYONS

— Minn. —, 161 N.W. 2d 842. N.W. 2d paging indicated.

(842)

Daniel EMERY and Mileda Emery dba
The Main Diner,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES
UNION LOCAL NO. 556, et al.,

Respondents.

No. 40440.

Supreme Court of Minnesota.

Sept. 13 1968.

Rehearing Denied Oct. 31 1968.

Self-employers operating diner sought damages from union and individuals for activitities designed to force one of the plaintiffs to join the union. The District Court, Ramsey County, Ronald E. Hachey, J., entered order granting union's motion for judgment notwithstanding special verdicts of jury, and self-employers appealed. The Supreme Court, Nelson, J., held that picketing by union in order to coerce self-employer of diner to join union as passive members subject to rules and sanctions of union but without right to participate in union meetings or to vote was picketing in order to achieve and unlawful labor objective and the picketing itself was therefore unlawful and could be enjoined by state court.

Reversed in part and affirmed in part.

Peterson, J., dissented.

(843)

Syllabus by the Court

1. The natural interpretation of Minn. St. 179.11(7)

comprehends that a labor practice which attempts to compel a person to join or refrain from joining a labor organization against his will shall be unlawful and therefore not a protectected exercise of freedom of expression.

2. In determining under what circumstances picketing may be enjoined in the light of the United States Supreme Court decisions handed down from 1940 to the present time, three elements must be taken into consideration, namely, (1) the manner or character of the picketing; (2) the objective sought; and (3) the persons who are affected. The United States Supreme Court has determined that immunity of picketing, as a form of free speech, is qualified, recognizing that picketing conducted in a context of violence loses its communicative character as an appeal to reason and becomes instead a weapon of force.

3. In general, recent decisions of the United States Supreme Court hold that a state may constitutionally enjoin peaceful picketing which is undertaken or conducted for an unlawful objective. Constitutionally, an objective may be declared contrary to public policy or unlawful by either the state's legislature or its judiciary.

4. It is clear that if plaintiffs joined defendant union as passive members they would have neither the right to attend local meetings, to voice their opinions, nor to vote. Joining the union under those circumstances, they would become amenable to the rules and sanctions of the union without the right to participate in the proceedings by which such rules and sanctions are passed. Clearly, this would create a discriminated against class of members. That cannot and should not be held to be a proper and lawful labor objective. It must be held that the objective

sought by defendants in the instant case is unlawful and that picketing to obtain such objective is unlawful.

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5. It is an actionable wrong to directly or indirectly interfere with or disturb another in his business without lawful cause or justification.

Raymond J. Kempe, St. Paul, for appellants.

Robins, Davis & Lyons and Stanford Robins, St. Paul, for respondents.

OPINIONS.

NELSON, Justice.

Plaintiffs appeal from a judgment of the District Court of Ramsey County and an order of that court granting defendants' motion for a judgment notwithstanding the special verdicts of the jury and, should that order be reversed, granting defendants a new trial unless plaintiffs consented to a reduction to the total amount of the verdict from $13,500 to $8,500. Defendants seek review of that part of the court's order which conditionally granted a new trial and denied their motion for a new trial in so far as it was based on asserted errors of law and insufficiency of the evidence.

If all conflicts in the evidence are resolved in favor of the prevailing parties below, the facts appear to be as follows: Plaintiffs, Daniel and Mileda Emery, brought this action on December 31, 1963, seeking damages from the defendant union and Ernest Legato, Kenneth Everhart, Julius Karlakofski, and Harold Kensinger, as individuals, for activities designed to force one of the plaintiffs to join the union.

In March 1961 plaintiffs purchased The Main Diner, a

restaurant with a seating capacity of 23 or 24 persons. At that time plaintiffs had a part-time employee, Irma Yanish. They advanced the money for her to join defendant union, defendant Ernest Legato having contacted them about her becoming a member. Mrs. Emery at the time of the purchase was a waitress at the Manor and belonged to the union, helping her husband out at The Main Diner in her off hours. Later in 1961 she quit her job and worked full-time at the diner. Irma Yanish left the employ of plaintiffs in December 1962.

Acting upon defendant Legato's advice, Mrs. Emery took a withdrawal card from the union after leaving the Manor because she would, with her husband, be acting as manager or employer of The Main Diner. Legato agreed that she would no longer receive benefits by belonging to the union. She paid the usual fee for the withdrawal card. Later in February 1963, Legato contacted Mrs. Emery at The Main Diner about her or her husband joining the union. They refused. Mr. Emery stated that he and his wife were owners and operators of the restaurant and under the circumstances would not join the union. Thereafter, Emery received notice that he should appear before the state labor conciliator and did so twice. At the first meeting defendant Kensinger told Emery he would be put out of business unless he joined the union but he still refused.

Sometime toward the end of June 1963, Legato contacted plaintiffs at The Main Diner to join the union. Mr. Emery stated that he did not know which one was the employer or the employee, they were just owners and they did not want to join. During June, Legato recommended and the union hired a picket, Legato instructing him what to do. The picket, on hand during the busiest time of the day, car-

ried a sign or banner and would stand in front of the door or walk slowly back and forth before the restaurant. Mr. Emery was told that the picket would be removed if either he or his wife joined the union. After the picketing began, plaintiffs' business was reduced by over one-half.

Mr. Emery testified that on October 24, 1963, he saw defendants Legato, Everhart, and others stopping 20 or 25 customers in front of the restaurant, tapping them on the shoulder, and talking to them, and that the customers turned away and did not come into the diner. At that

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time Legato and Everhart passed out leaflets saying that The Main Diner was "unfair." When Emery called the police, the union organizers disappeared.

Mr. Emery testified that the picketing continued into 1964 and that since his business had fallen off he went to several relators to try to sell but was unsuccessful for several months. Emery testified that he had purchased the restaurant for $4,500 in 1961 and had gradually increased its business so that prior to the union picketing it was worth $10,000. The increased value resulted from much hard work: Plaintiffs put in over 12 hours a day working in their restaurant, replaced quite a bit of the restaurant equipment, and Mrs. Emery cooked hot meals "like you would have at home." The best offer plaintiffs could obtain for the business was $5,000, to be paid by a down-payment of only $300 and payments of $75 per month until the balance was paid off. The restaurant was sold on those terms on July 1, 1964, but the purchaser made only one monthly payment of $75 and then left town, making no further payments.

At the conciliation meetings Emery made it clear that plaintiffs had no employees and that he and his wife were management and would not obtain any benefits by joining the union. He testified that one of the union representatives at the meetings said that unless he or his wife joined the union he would be ruined and "thrown to the financial wolves."

The testimony indicated that the dispute between the union and plaintiffs came about because the restaurant did not display a union house card, something that either plaintiff could obtain by joining the union.

Article XV of the collective bargaining agreement, admitted in evidence as defendants' exhibit 1 which had been signed by Mr. Emery and a representative of defendant union on October 16, 1961, reads in part:

"In those establishments where an owner or owners work a shift or shifts, *such owner or owners must become passive members of the Union under the rules and regulations of the International Union* and the provisions of the International Union's Constitution and the Local Union's by-laws, and any amendments thereto, in order to display the Union House Card, and such owner or owners, need become passive members only under the following circumstances:

"1. *In establishments where all work is done by one (1) or two (2) working proprietors or partners, such proprietor or proprietors shall become passive members of the Union.* In such establishments, all relief or extra help, as hereinafter defined, must be members of the Union if they work in excess of eight (8) hours a week." (Italics supplied.)

Defendant Everhart admitted that he had written a letter to Mr. White, business agent of the American Linen

Company employees (who worked nearby and patronized plaintiffs' restaurant), asking him to advise their union members not to patronize The Main Diner; and that bulletins were mailed to other unions in the area stating they were not to patronize the diner. Defendant Everhart admitted also that even if plaintiffs were to join the union as passive members they would not be able to vote at any union meetings nor would they be able to attend any union meeting to voice their views; and that the only thing a passive member does is to pay dues.

[1] It is the contention of plaintiffs that the evidence is conclusive that the activities of defendants and the purposes or objectives of the union in picketing their place of business were unlawful. The determination of what is the immediate or controlling objective in a given instance of picketing is primarily a question of fact. The jury found that defendants had violated Minn. St. 179.11(7) and 179.42, and that plaintiffs had suffered damages of $3,000 resulting from overall picketing; of $250 from the letter sent by

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defendant Everhart to the American Linen Company union representative; and of $250 from activities of certain of the defendants on October 24, 1963. The jury assessed punitive damages of $10,000. The court in its post-trial order granted a new trial (if its order granting judgment notwithstanding the verdict were reversed) unless plaintiffs consented to a reduction of the verdict from $13,500 to $8,500.

1. We will first give consideration to §179.11(7), which reads as follows:

"It shall be an unfair labor practice:

* * * *

"(7) For any employee, labor organization, or officer, agent, or member thereof, to compel or attempt to compel any person to join or to refrain from joining any labor organization or any strike against his will by any threatened or actual unlawful interference with his person, immediate family, or physical property, or to assault or unlawfully threaten any such person while in pursuit of lawful employment."

[2] It would appear that the natural interpretation of this statute, as was indicated by this court in Starr v. Cooks, etc. Union Local No. 458, 244 Minn. 558, 70 N.W. 2d 873, comprehends that a labor practice which attempts to compel a person to join or refrain from joining a labor organization against his will shall be unlawful and therefore not a protected exercise of freedom of expression.

It is clear of course that the phrase "threatened or actual unlawful interference" refers only to strikes. The legislature was undoubtedly aware that there are various means of coercion and did not intend to allow some coercive methods to the exclusion of other coercive methods to compel one to join or refrain from joining a labor union.

2. Defendants cite Coons v. Journeymen Barbers, etc. Union, 222 Minn. 100, 23 N.W. 2d 345, as a controlling case in support of their position. It is clear that this court decided the Coons case solely upon the then existing United States Supreme Court decisions.

In the Starr case, an action to restrain a union and others from picketing, the court below found that the picketing had been limited to one picket or banner carrier at each of the three entrances to plaintiffs' building and that the picketing had been peaceful with the exception of one isolated instance. The trial court also found

that one of the plaintiffs had been told, when he appeared with a deliveryman, that there would be no sanctions or punishment to a deliveryman who made a delivery even though he was a member of another union. This court held that the findings of the trial court were sustained by the evidence and stated that since the controlling facts were established by such findings we were required to accept them as true in determining whether the trial court erred in refusing to issue a temporary injunction. Citing Coons v. Journeymen Barbers, etc. Union, supra, and Glover v. Minneapolis Bldg. Trades Council, 215 Minn. 533, 10 N.W. 2d 481, 147 A.L.R. 1071, the court went on to say that the decisions of the United States Supreme Court were controlling, since the questions therein arose primarily under the Constitution of the United States.

The court in the Starr case noted that the Glover decision, which recognized peaceful picketing (to induce an employer to hire union labor to do work which he had been doing personally) as an exercise of freedom of speech secured by U.S. Const. Amend. XIV, was based on principles enunciated by the United States Supreme Court in Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S. Ct. 857, 81 L.Ed. 1229; Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Carlson v. People of State of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132

A.L.R. 1200; American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855; Bakery & Pastry Drivers, etc. v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.E. 1178; and Carpenters & Joiners Union, etc. v. Ritter's Cafe, 315

U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143.

In Coons, an action by the owner-operator of a barbershop to restrain a union from picketing his shop to induce him to join the union, the later decision of Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58, was held to be controlling. We therefore held in the Coons case that peaceful picketing of the business premises of one who did his own work and had no employees, even though the picketing caused a loss of patronage and prevented deliveries of supplies, was a part of the freedom of speech secured by U.S. Const. Amend. XIV and could not be enjoined.

Since the Coons decision the United States Supreme Court has handed down several significant opinions which have qualified the prior holdings of that court with respect to the exercise of the right of peaceful picketing as a phase of freedom of speech under the Fourteenth Amendment. Among these decisions are Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834; Hughes v. Superior Court, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985; International Brotherhood, etc. v. Hanke, 339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. 995; Building Service Emp. Intern. Union, etc. v. Gazzman, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045; and Local Union No. 10, United Ass'n of Journeymen, Plumbers, etc. v. Graham, 345 U.S. 192, 73 S.Ct. 585, 97 L.Ed. 946.

[3, 4] As we pointed out in the Starr case, in determining under what circumstances picketing may be enjoined in the light of the United States Supreme Court decisions handed down from 1940 to the present time, three elements must be taken into consideration, namely, (1) the manner or character of the picketing; (2) the objective sought; and (3) the persons who are affected. Prior to 1940 picketing as a means of

exerting economic pressure was considered to be an actionable tort unless justified. Thereafter, the decision of Thornhill v. State of Alabama, supra, established the doctrine that peaceful picketing is a constitutionally protected medium of free speech which, under the Fourteenth Amendment, is immune from hostile state action. In Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies, Inc., supra, immunity of picketing as a form of free speech was qualified when the court recognized that picketing conducted in a context of violence loses its communicative character as an appeal to reason and becomes instead a weapon of force. Although the Supreme Court reaffirmed peaceful picketing as a means of communication, it held that picketing would be enjoined where it is attended with acts of violence and its continuance excites reasonable fears that violence will be resumed. Thus, the court upheld the right of a state to enjoin picketing when it is enmeshed with violence or conducted in a manner which is productive of violence. Minnesota expressly recognized peaceful picketing as a constitutionally protected form of free speech by enacting a statute which prohibits its courts from restraining picketing as a means of publicizing the facts in a labor dispute as long as it involved neither fraud nor violence. Minn. St. 185.10(5).

3. In the Starr case we stated that the second qualifying element, the objective sought, was added to the juristic appraisal of picketing by the Giboney, Hughes, Hanke, and Gazzam decisions; and that this involved a recognition that picketing has a hybrid character and is, in addition to being a medium for the dissemination of information concerning the facts of a labor dispute, a specie of economic coercion.

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[5, 6] This court, speaking through Mr. Justice Matson,

went on to say (244 Minn. 565, 70 N.W.2d 878):

"In general, the recent decisions of the United States Supreme Court hold that a state may constitutionally enjoin peaceful picketing which is undertaken or conducted for an unlawful objective. Constitutionally an objective may be declared contrary to public policy or unlawful by either the state's legislature or its judiciary. Although the public policy of a state may be found in its constitution, statutes, and court decisions, its establishment is primarily for the lawmakers. The burden of proving an unlawful objective continues to rest, however, on the person seeking the injunction. Suoject to certain limitations which have not been defined with either clarity or finality, the determination of what is an unlawful objective has been left to the states by the recent United States Supreme Court decisions. The element of *what persons are affected* has a bearing upon what constitutes a sound public policy. In the Hanke case the majority opinion assumed that a state, in determining the permissibility of restrictions on picketing in a particular case, may weigh such community interests as free communications, effective unions, and the welfare of small businessmen; the dissents and the special concurrence, however, leave the future of the 'community interests' test in doubt.

"We need not here, however, attempt to formulate a general rule for defining the allowable area of economic conflict. Since picketing is a hybrid it would be erroneous to adopt a rule which protects from injunctive restraint all picketing which has at least one lawful objective. Realistically, almost any instance of picket-

ing has for one of its objectives the communication of information. Equally unsatisfactory is a rule which would enjoin picketing which has any objective which is unlawful. *The determination of what is the immediate or controlling objective in a given instance of picketing is primarily a question of fact.*" (Italics supplied in part).

See, *The Unlawful Purpose Doctrine in Peaceful Picketing and Its Application in the California Cases,* 24 So. Cal.L.Rev. 145, where Professor Pendleton Howard states:

"The most striking recent development in the field of labor law has been the United States Supreme Court's retreat from the much discussed decision in 1940 in *Thornhill v.* [*State of*] *Alabama,* generally interpreted as announcing the doctrine that peaceful picketing is a form of constitutionally protected free speech immune from hostile state regulation. This retreat has been accomplished in four decisions—*Giboney v. Empire Storage & Ice Co.,* decided on April 4, 1949, and *Hughes v. Superior Court, International Brotherhood of Teamsters v. Hanke,* and *Building Service Employees International Union v. Gazzam,* all decided on May 8, 1950. Not only have these decisions cut down the reach of the *Thornhill* case, but they have thrust into sharp focus the so-called 'unlawful purpose doctrine'—the doctrine (which has won increasing favor in recent years from state courts) that, though the *manner* in which the picketing is conducted is unobjectionable, the *objective* sought by the pickets is not a legitimate one and hence their activity may be enjoined."

At this point it seems clear that the Coons case is distinguished from the situation in the case at bar by the fact that there is nothing in the Coons case to show that Coons by joining the barbers' union would be prohibited from attending union meetings, voicing his opinions on issues, and voting thereon. In the instant case, according to the testimony of witnesses for defendants, if either plaintiff were to join the union he could only be a passive member and as such could not attend any union meetings, voice his views, or vote. As passive members, all plaintiffs could do would be to pay dues.

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The Supreme Court made it clear in the Giboney case by a unanimous decision that it is constitutionally possible for the states to restrict picketing, even though the manner in which it is carried on is unobjectionable, if the objective sought is an unlawful one. In the Gazzam case, Mr. Justice Minton, speaking for the court, said (339 U.S. 539, 70 S.Ct. 788, 94 L. Ed. 1051):

> "* * * An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by by the employer of the employees' selection of a bargaining representative. Peaceful picketing for any unlawful purpose is not prohibited by the decree under review.
>
> "* * * *Respondent does not contend that picketing per se has been enjoined but only that picketing which has as its purpose violation of the policy of the State. There is no contention that picketing directed at employees for organization purposes would be violative of that policy. The decree does not have that effect."

In the Hughes case, Mr. Justice Frankfurter stated (339 U.S. 465, 70 S.Ct. 721, 94 L.Ed. 992):

"* * * Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. * * * 'A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual.' ".

Mr. Justice Frankfurter emphatically rejected the contention frequently raised in free speech cases that judicial declarations of public policy are not entitled to as much respect as legislative enactment (339 U.S. 466, 70 S.Ct. 722, 94 L.Ed. 993):

"* * * The fact that California's policy is expressed by the judicial organ of the State rather than by the legislature we have repeatedly ruled to be immaterial.

"* * * In charging its courts with evolving law instead of formulating policy by statute, California has availed itself of the variety of law-making sources, and has recognized that in our day as in Coke's 'the law hath provided several weapons of remedy.' "

In the Hanke case, a case most important since no legislation was involved, Mr. Justice Frankfurter, speaking for the court, stated (339 U.S. 477, 70 S.Ct. 777, 94 L.Ed. 1003):

"[The] Washington [Supreme Court] here concluded that, even though the relief afforded the Hankes and Cline entailed restriction upon communication that the the unions sought to convey through picketing, it was more important to safeguard the value which the State placed upon self-employers, leaving all other channels of communication open to the union. * * * 'From this fact' so we are informed * * *, 'the conclusion seems irresistible that the union's interest in the welfare of a mere handful of members (of whose working conditions no

complaint at all is made) is far outweighed by the interests of individiual proprietors and the people of the community as a whole, to the end that little businessmen and property owners shall be free from dictation as to business policy by an outside group having but a relatively small and indirect interest in such policy.' [Hanke v. International Brotherhood of Teamsters, etc.,] 33 Wash. 2d [646] at 659, 207 P. 2d [206] at 213.

* * * *

"* * * But when one considers that issues not unlike those that are here have been similarly viewed by other

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States and by the Congress of the United States, we cannot conclude that Washington, in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice. * * *

"We need not repeat the considerations to which we adverted in *Hughes v. Superior Court* that make it immaterial, in respect to the constitutional issue before us, that the policy of Washington was expressed by its Supreme Court rather than by its legislature."

[7] Endorsing the rationale of the Washington court was tantamount to giving courts the authority to enjoin undesirable picketing. All that was necessary was to find that the picketing contravened the community's best interests. Accordingly, the United States Supreme Court has abandoned to the states the task of defining the allowable area of economic conflict.

4. In Saveall v. Demers, 322 Mass. 70, 76 N.E. 2d 12, 2 A.L.R.2d 1190, a union, composed partly of members who

owned and operated their own barber shops without employees and partly of employees of masterbarbers, picketed a non-union barber who owned and operated his own shop in order to compel him to join the union or raise his price. the Massachusetts court held that the picketing could not be justified as an exercise of the constitutional right of free speech, stating (322 Mass. 74, 76 N.E.2d 14):

> "If picketing is speech it is certainly also much more. However peacefully it may be carried on, it possess elements of compulsion upon the person picketed which bear little relation to the communication to anyone of information or of ideas. And resort is commonly had to its precisely because of these elements, which, much more than any force of argument contained in it, give it the power it possesses. To fail to recognize these facts is to put reality aside. It would seem, therefore, that even if picketing is constitutionally protected in its aspect as speech, it must, because of its other aspects, be subject to some degree of regulation as to circumstance, manner, and even object, lest orderly existence be submerged in a flood of picketing by groups of people, having no peculiar right of their own, to make other people do what they do not wish to do and as free men are under no obligation to do. If we are correct in supposing that the right to picket is subject, for the protection of paramount public welfare, to some balancing of the conflicting interests of the parties immediately involved, we have before us a case where, on the one hand, the contribution of the defendants' acts to the free interchange of thought in Fitchburg reaches the vanishing point, while on the other hand there is danger that the fundamental right of the plaintiff to work with his own hands to what he regards as his best advantage may be destroyed."

The jury in the case at bar also found defendants had violated §179.42, which reads as follows:

"It is an unlawful act and an unfair labor practice for any person or organization to combine with another, to cause loss or injury to an employer, to refuse to handle or work on particular goods or equipment or perform services for an employer, or to withhold patronage, or to induce, or to attempt to induce, another to withhold patronage or other business intercourse, for the purpose of inducing or coercing such employer to persuade or otherwise encourage or discourage his employees to join or to refrain from joining any labor union or organization or for the purpose of coercing such employer's employees to join or refrain from joining any labor union

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8 The foregoing statutory provision is part of the chapter dealing with the secondary boycott. The trial court in memorandum made a part of its post-trial order stated:

"* * * A reading of that statute will disclose that certain acts are forbidden with intent to coerce or induce a *employer*, to encourage or discourage an *employe*, to join or refrain from joining a labor organization, or to coerce the *employes themselves* to join or refrain from joining a labor organization. * * It is somewhat difficult to determine why it is unlawful to coerce an employe to refrain from joining or to join a union, or to directly coerce an employe to refrain from joining or to join a union, while at the same time the same type of conduct, if used to coerce the employer to refrain from joining or to join a union, is not unlawful."

It is hardly conceivable that the Minnesota legislature would

enact a law to prohibit or prevent coercion of employees by a union and leave no corresponding protection to prohibit or prevent coercion by a union against an employer or self-employer for an unlawful purpose. There is ample evidence in the record herein to show that these defendants unlawfully interfered with the self-employed plaintiffs' property rights.

In Riviello v. Journeymen Barbers, etc. Union, 88 Cal.App. 2d 499, 505, 199 P. 2d 400, 404, the California court said:

> "On the authority of the Angelos case [Cafeteria Employees Union Local 302 v. Angelos, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed 58] the Supreme Court of Minnesota, in a case somewhat similar to the instant one, affirmed a denial of an injunction in Coons v. Journeymen Barbers, etc. Union, 222 Minn. 100, 23 N.W. 2d 345. There the same union here involved sought to compel the plaintiff, an operator of a one-man barber shop to join the union, and, when he refused, began to picket. Plaintiff sought to enjoin the picketing. The trial court refused to enjoin, and this action was affirmed by the Minnesota Supreme Court. The court discussed at length the holding of the Angelos case, and concluded that such case stands for the principle that it was a lawful labor objective to attempt to compel an employer-worker to become a member of the union.
>
> "From these authorities, and the reasoning upon which they are based, it must be held that it does not violate the public policy of this state to attempt by picketing, or other lawful means, to compel an employer, who also works at the trade, to join the union of those whom he employs and with whom he works."

The California court then proceeded to consider the facts in the Riviello case to determine whether compelling one to be-

come a passive member of a union constituted a lawful labor objective (88 Cal.App.2d 506, 19[illegible] P.2d 405):

"That fact that it is lawful to picket to attempt to compel an employer who works at the trade to join the labor organization with which he is competing, does not, however, settle the present controversy. Here the record shows that the only type of membership offered to plaintiffs is a nonactive membership. The defendants propose to picket to try to compel plaintiffs to become entirely sterile members of the union, without the right of any voice in union affairs. If they join they will have neither the right of seat nor voice in local meetings, and will not have the right to hold any union office or the right to attend conventions as union delegates. Apparently, the only 'right' they would possess would be the 'right' to pay dues. If they should join the union under such circum-

stances they would thus become amenable to the rules and sanctions of the union without the right to participate in the proceedings by which such rules and sanctions are passed. A clearer case of attempting to create a discriminated against class of members cannot be imagined. This is the focal point in this case. While, as already pointed out, in this state it is lawful to attempt to 'coerce peacefully' an employer who works at the trade to induce him to join the union, it seems too clear to require lengthy discussion that such activity cannot be held to be lawful unless full membership in the union is offered. According to the uncontradicted evidence, these plaintiffs cannot remain in business unless they have a union card. * * * In other words, plaintiffs cannot earn a living at their trade unless they join the union, and, if they join, they

become sterile members. That cannot and should not be held to be a proper and lawful labor objective.

"That such actions are unlawful is clearly demonstrated by the reasoning of our Supreme Court in the recent, well-reasoned and unanimous decision in James v. Marinship Corp., 25 Cal.2d 721 [155 P.2d 329, 160 A.L.R. 900]. There the court held that a union had no lawful right to maintain both a closed shop agreement with employers and an arbitrarily closed or partially closed union membership. * * *

"*Thus, it must be held that the objective sought by defendants is unlawful, and that the threat to picket to obtain such objective, is unlawful.*" (Italics supplied.)

Thus, it is clear from the decision in Riviello that California adopted the view of the Minnesota court on the lawfulness of picketing to compel an owner-operator to join a union, but went on to say that it was unlawful to place the owner in a position of having to accept second-class membership in the union and that picketing for that purpose is not protected under the Constitution.

[9] It appears to us that the facts in the case at bar closely parallel those in the Riviello case and that the actions of defendants must be held to constitute an unlawful labor objective. Their objective being unlawful picketing to obtain it is also unlawful.

[10] 5. In Dinoffria v. International Brotherhood of Teamsters, etc., Union, 331 Ill.App. 129, 72 N.E.2d 635, the court held that while employees may combine for the purpose of obtaining lawful benefits for themselves, and where the primary purpose of combination is to further the interests of the organization and improve conditions of its members, what ever injury may follow is merely incidental, the law gives no

sanction to combinations which have for their immediate purpose the injury of another. It was also held in Dinoffria (331 Ill.App. 142, 72 N.E.2d 641):

"* * * [I]t is an actionable wrong to directly interfere with or disturb another in his business without lawful cause or justification * * *."[1]

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[11] Based upon the record herein the jury was justified in finding the objective of defendants unlawful, and in assessing damages, both general and punitive. It is thus ordered that the judgment in favor of plaintiffs be reinstated, the total verdict, however, to be reduced from $13,500 to $8,500, this in effect reducing the punitive damages from $10,000 to $5,000, as ordered by the trial court if the order granting judgment notwithstanding the verdict be reversed on appeal.

The verdict as so reduced is reinstated.

Reversed in part and affirmed in part.

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[1] There can be little doubt that the United States Supreme Court has in the past 25 years retreated from its prior position that labor picketing was a form of constitutionally protected free speech which cannot be regulated by state action. This is clearly demonstrated by Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed 834; Hughes v. Superior Court, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed 985; International Brotherhood, etc. v. Hanke, 339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. 995; and Building Service Emp. Intern. Union, etc. v. Gazzam, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045. The change from the former position in Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, has been gradual, but its extent is clearly shown by the dissent of Mr. Justice Douglas in International Brotherhood of Teamsters, etc. v. Vogt, Inc., 354 U.S. 284, 297, 77 S.Ct. 1166, 1172, 1 L.Ed. 2d 1347, 1355:

"Today, the Court signs the formal surrender. State courts and state legislatures cannot fashion blanket prohibitions on all picketing. * * * [They] are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing."

See, also Howard, **The Unlawful Purpose Doctrine in Peaceful Picketing and Its Application in the California Cases,** 24 So.Cal.L. Rev. 145; Note, 41 Min.L.Rev. 655; Tannenhaus, **Picketing—Free Speech: The Growth of The New Law of Picketing From 1940 to 1952,** 38 Cornell L.Rev. 1.

PETERSON, Justice (dissenting).

The jury, by special verdict, found that defendants violated Minn.St. 179.11(7)[1] and 179.42[2] by picketing and other acts directed against plaintiffs, who are self-employed persons without employees, for the purpose of coercing them, or one of them, to join the defendant union. The court seems to hold that the acts of defendants were unlawful because contrary both to basic statutory policy and judicially declared public policy.

The conduct of defendants does not, in my opinion, violate either of the cited statutes. The *purpose* of defendats was, I agree, clearly contrary to the literal language of § 179.11(7), for the proscription against compelling "any person" to join a labor organization against his will is obviously broad enough to include self-employed persons. The *manner* for the accomplishment of such unlawful purpose, however, was not by unlawful interference with person, immediate family, or physi-

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[1] Minn.St. 179.11(7), which is part of the Minnesota Labor Relations Act provides:

"It shall be an unfair labor practice:

* * * * *

"(7) For any employee, labor organization, or officer, agent, or member thereof, to compel or attempt to compel any person to join or to refrain from joining any labor organization or any strike against his will by any threatened or actual unlawful interference with his person, immediate family, or physical property, or to assault or unlawfully threaten any such person while in pursuit of lawful employment."

[2] Section 179.42, which is § 3 of L.1947, c. 486, relating to secondary boycotts and other coercive practices, provides: "It is an unlawful act and an unfair labor practice for any person or organization to combine with another, to cause loss or injury to an employer * * * or to induce, or to attempt to induce, another to withhold patronage or other business intercourse, for the purpose of inducing or coercing such employer to persuade or otherwise encourage * * * his employees to join * * * any labor union * * * or for the purpose of coercing such employer's employees to join * * * any labor union or organization."

cal property of plaintiffs, nor by assault or unlawful threat against them—that is, conduct different from peaceful picketing. On the other hand, the manner by which defendants undertook to achieve their purpose was of the coercive character proscribed by § 179.42—yet its purpose was not proscribed by that section, for the section plainly relates only to the unlawful coercion or inducement of *employees*. I would hold as a matter of law, therefore, that the statutes are on their face inapplicable to the facts of this case.

I concede that it is within the judicial power of this court to declare such activities unlawful as contrary to public policy. The trial court instructed the jury:

> "* * * An objective may be declared contrary to public policy or unlawful by either the legislature or by the Supreme Court of the state. Although the public policy of the state may be found in its constitution, statutes, and
>
> (854)
>
> court decisions, really its establishment is primarily for the lawmakers, the legislature."

The court's instructions additionally contained a reading of the provisions of §§ 179.11(7) and 179.42. I think it highly doubtful, in this context, that the jury based its verdict on considerations of public policy other than the statutes. Because Minnesota has rather comprehensive labor relations statutes, I think the court itself should defer to legislative action[3] and not add to the body of labor law by judicial decision.

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[3] It is, of course, competent for the legislature to proscribe conduct of the kind involved in this case. Section 8(b) (4) of the National Labor Management Relations Acts prohibits labor organizations from engaging in such concerted activity where an objective of such activity is "forcing or requiring any employers or self-employed person to join any labor or employer organization." 61 Stat. 141, as amended, 29 U.S.C.A. § 158(b) (4). In my view, the omission of such express provision in the state labor relations act itself represents a contrary determination of state public policy.

PLAINTIFFS' EXHIBIT 11

July 31, 1963

Mr. Marty White
Business Representative
Local 319
555 Wabasha St.
St. Paul 2, Minnesota.

Dear Brother White:

In answer to your inquiry as to the issues involved in the dispute between Main Diner and Local 556. We want to state that our position is relatively clear and is the historical trade union position, that eating places patronized by union members should display a Union card and that at least one person employed on the premises should be a member of organized labor. The constitution of our international Union requires that where two persons own an establishment without employees that one of the persons should be a union member. The Main Diner Cafe has always been a Union restaurant. It was union when it was owned by Mr. Whalen and when later purchased by Mr. Burt Naston who now owns the Mickey's Diners. When the restaurant was sold in 1961 to Mr. Emory, local 556 had difficulty with Mr. Emory in getting him to sign an agreement although at the time he did have one of our members employed. After a hearing before the labor conciliator on April 1, 1961 Mr. Emory did sign an agreement and the Main Diner was recognized by our union as a union house. Subsequently, Mrs. Emory laid off his employee and Mrs. Emory, who is a former member of our local went to work in the establishment. Mr. Emory has since refused to recognize the agreement and at present there are no members of the union in the Main Diner nor does it display a Union label.

This is the only non-union establishment in the area. We

have repeatedly been asked by union restaurant operators in the area why the Main Diner does not support the Hotel and Restaurant Union. The labor conciliator held a hearing at our request in February of this year, during which Mr. Emory stated that he could see no reason, since he owned the business why they should join the union.

We explained the requirements of our constitution and the philosophy of the labor movement; that business should support the working people who support them. Mr. Emory apparently did not agree with this position and the joint board took action to place an informational picket before the premises at 264 Main Street. We are quite reluctant in these situations to put informational pickets before the establishment but we have no other effective or legitimate means to inform our union members of an establishment that is unfair to the labor movement in general.

I'm sure you appreciate, Brother White, that union members working in the area of the Main Diner, should patronize union establishments. Our union has worked long and hard to improve the wages and standards of people who work in the restaurant industry. We cannot allow these wages and standards to be reduced by non-union establishments that remain in competition to our union houses. Union laundry workers better than most workers appreciate what unfair competition can mean to wages and working conditions.

Should you desire further information regarding this matter please call us.

Fraternally yours,
KEN EVERHART
Business Representative

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